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No. 419.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JOHN KEHOE.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939. No. 419.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

v.

John Kehoe.

BRIEF FOR RESPONDENT.

The respondent respectfully submits this brief in opposition to the brief on behalf of Guy T. Helvering, Commissioner of Internal Revenue, petitioner.

QUESTION PRESENTED.

Where a taxpayer files his income tax return for 1925 without accounting therein for alleged taxable income from the illegal operation of a brewery, and thereafter the Commissioner of Internal Revenue, upon the basis of an investigation and report to him

by his representative, determined an additional net income of $53,990.46, upon which tax was assessed and paid and a closing agreement entered into, and later the commissioner seeks to set aside the closing agreement on the ground that brewery income had not previously been taxed;

(1) Did not the Circuit Court properly hold, as a matter of law, that the finding of fact of fraud or malfeasance or misrepresentation of fact in the closing agreement, was unsupported by any substantial evidence, when the Commissioner, upon whom the statute imposed the burden of proof, presented no evidence (which was in his power to produce), as to the nature or source of the additional income covered by the closing agreement, or as to how he determined same, or as to taxpayer's conduct or participation in the matters connected with the closing agreement?

STATEMENT OF THE CASE.

Taxpayer's return for 1925 filed March 15, 1926, showed gross income of $27,865.61 and a net taxable income of $19,198.33 on which tax was paid (Ex. LLL and R. 5, 6, 10, 11, 24). As a result of investigation and report by his agents in September, 1927, the Commissioner increased taxpayer's net taxable income to $73,188.79, an increase of $53,990.46 upon which taxpayer paid additional tax and interest of $10,437.18 (R. 5, 6, 10, 24, 25). Thereafter on January 27, 1928, taxpayer and Commissioner, pursuant to Section

1106(b) of the Revenue Act of 1926, agreed in writing, approved by the Acting Secretary of the Treasury, that taxpayer's liability for 1925, as then determined, should be final and conclusive (R. 6, 7, 10, 11, 24-26).

On February 24, 1932, Commissioner notified taxpayer that the closing agreement had been set aside (R. 9) and that he had determined a deficiency in tax for 1925 of $208,043.36, plus a 50% fraud penalty of $108,803.61 based on income in the amount of $890,000 from the operation of a brewery (R. 8-9). The Commissioner's statement of the deficiency (R. 9) showed that the $890,000 embraced the additional income of $53,990.46 covered by the closing agreement. Taxpayer petitioned the Board of Tax Appeals for a redetermination of this deficiency (R. 4-9).

The Board found that the Commissioner had established taxpayer's connection with the brewery in 1925 and that no income therefrom had been accounted for in his original return for that year. It also found that the income of at least $890,000, disclosed by the evidence, represented "gross receipts" from sales of beer (R. 28-30).

Upon the issue made by the pleadings, whether the taxpayer had additional taxable income beyond the $53,990.46 covered by the closing agreement (R. 11-15), the Commissioner, although his agents had investigated and reported on the additional taxable income covered by the agreement, did not call his agents as witnesses, or present their report, or other-

wise attempt to show the nature or source of the additional income covered by the closing agreement whether from the brewery or elsewhere, or how he determined same before entering into that agreement, or taxpayer's conduct or participation in the matters connected with the closing agreement. Nor did the petitioner prove when he first knew of the additional income from the brewery.

The Board concluded that the Commissioner had sustained his burden of proving fraud or malfeasance or misrepresentation of fact in the closing agreement and was justified in setting it aside (R. 24-25, 28-29).

On this issue the Circuit Court reversed the Board, saying:

> "As the proofs stood, and now stand, we are of opinion the government has not made out its case. There is no ground of proven fact to support a finding that the now alleged brewery liability was not included in the settlement, in the $53,000 additional gross income of Kehoe. There is no proof of any other alleged liability on the part of Kehoe which led to this large addition. It will be noted that the Tax Board nowhere considered or discussed the two underlying, basic and important questions—first, what tax liability was considered and involved in the settlement made in pursuance of the revenue officer's examination. Second, on what liability, if not for the brewery, was the additional $53,000 predicated? And lastly, and all important, the failure of the government to call its agent and show by him, if it could, that the brewery liability was not involved in the settlement" (R. 317).

ARGUMENT.

1. There was no substantial evidence to support the ultimate finding of the Board that there was fraud or malfeasance or misrepresentation of fact in the execution of the closing agreement.

The court below reversed the Board of Tax Appeals upon the issue of fraud or malfeasance or misrepresentation of fact materially affecting the determination and assessment of the tax covered by the closing agreement, and rightly so, we contend, because the Board's ultimate finding was not supported by substantial evidence.

On this issue the Commissioner, petitioner here, had the burden of proof by statute.

Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 113, See: 26 U. S. C. A. 1660(b));

Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 872, 26 U. S. C. A. 612);

Jones v. Simpson, 116 U. S. 609, 615 (1886).

What is substantial evidence upon an issue of fraud? Not inference or presumption, nor even a bare preponderance which leaves the issue in doubt, but only that which is **clear, unequivocal and convincing,** and, of course, the best evidence of which the nature of the case will admit.

United States v. American Bell Telephone Co., 167 U. S. 224 (1897);

Farrar v. Churchill, 135 U. S. 609 (1890);

Colorado Coal and Iron Co. v. United States, 123 U. S. 307 (1887);

Maxwell Land-Grant Case, 121 U. S. 325 (1887);

Jones v. Simpson, supra;

United States v. Arredondo, 6 Peters 691, 21 U. S. 689 (1832);

Griffiths v. Commissioner, 50 Fed. (2d) 782 (C. C. A. 7, 1931);

Budd v. Commissioner, 43 Fed. (2d) 509 (C. C. A. 3, 1930);

Kerbaugh v. Commissioner, 29 B. T. A. 1014 (1934).

Confronted with the closing agreement, which he had made with the taxpayer in 1928, and which, *prima facie*, finally and completely settled all controversies between them in respect of the 1925 tax liability[1], the Commissioner could sustain his burden only by proving **clearly** and **convincingly** that the additional income of $53,990.46 covered by the closing agreement, did not include respondent's taxable income from the brewery.

However, the Commissioner admits (petitioner's brief page 7) that **"The nature of the additional income of $53,990.46 on which this deficiency was based is not disclosed by the record."** And why was this not disclosed? Because the Commissioner, while admitting (R. 10):

[1] Wolverine Petroleum Corporation v. Commissioner, 75 Fed. (2d) 593 (C. C. A. 8, 1935).

> * * * that about the month of September 1927 a representative of the Bureau of Internal Revenue made an investigation of the income tax liability of said petitioners for the year 1925; * * * that the report of the investigation was prepared and forwarded to respondent at Washington, D. C., on about September 19, 1927, * * * that the report showed a total tax liability (inclusive of the amount shown on the aforesaid return) of $9,758.42 for said year or an additional tax for said year of $9,563.86; * * * that in the computation of such additional tax liability the representatives of the Bureau of Internal Revenue increased the taxable income for 1925 from $19,198.33 as shown by the aforesaid return to $73,188.79; * * *"

for some reason, as yet unexplained, did not call his investigating agent as a witness, or present his report, or otherwise attempt to show the nature or source of the additional income covered by the closing agreement, whether from the brewery or elsewhere, or how he determined same before entering into that agreement, or taxpayer's conduct or participation in the matters connected with that agreement.

Logically this was the primary and best evidence of which the nature of the case would admit and it was within petitioner's power to produce it. The absence of the primary evidence, not accounted for, raises a presumption that, if produced, it would give a complexion to this case adverse to the interest of the petitioner.

Clifton v. United States, 45 U. S. 242, 4 How. 242 (1846);

Runkle v. Burnham, 153 U. S. 216 (1894);

Caminetti v. United States, 242 U. S. 470 (1917);

Bilokumsky v. Tod, 263 U. S. 149 (1923);

Mammoth Oil Co. v. United States, 275 U. S. 13 (1927).

In

Interstate Circuit, Inc. v. United States, 306 U. S. 208 (1939),

this Court stated (at page 226):

> "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character."

Nor is the petitioner here, an officer of the government, having the burden of proof, any less susceptible to the unfavorable presumption which arises from failure to produce the best evidence in his power than the ordinary litigant.

Lau Hu Yuen v. United States, 85 Fed. (2d) 327 (C. C. A. 9, 1936).

Petitioner attempts to circumvent his failure to produce witnesses to prove the nature of the additional income covered by the closing agreement by

pointing to certain evidence discussed on pages 17 to 23 of his brief. However, as will appear, this evidence is insufficient.

1. The evidence proving that the 1925 return was false and fraudulent with intent to evade tax is no evidence that the closing agreement executed January 27, 1928, was induced by fraud or misrepresentation.

It is well settled that the return and the agreement are separate, and fraud in one does not prove fraud in the other.

Ingram v. Commissioner, 32 B. T. A. 1063 (1935), Affirmed in 87 Fed. (2d) 915 (C. C. A. 3, 1937).

The fact that here there was a closing agreement subsequent to the filing of the original return indicates that the original return was incorrect, false or fraudulent. Unreported income was revealed to petitioner before the deficiency was assessed in 1927, or there would have been no additional assessment and no closing agreement. Since there was a discovery of unreported income at that time, and knowledge of this fact on the part of petitioner, on what theory shall it be presumed that such income was not from the brewery? Indeed, the only presumption is to the contrary—that, there being an investigation, it revealed the brewery income, which was promptly taxed.

2, 3 and 4. The evidence proving that the brewery was operated by taxpayer in the name of his em-

ployee, McGowan, from February, 1924 to February 28, 1927, and that his connection therewith was not known to the public generally, is no evidence that petitioner did not know of this relationship at the time of the execution of the closing agreement months later. If petitioner did not then know of the relationship, it was his duty to so testify. Otherwise there is no proof that he did not know.

5. The fact that taxpayer before late February, 1927, was planning to continue operating the brewery during 1927, and sought a permit in the name of John Carroll, but finally had McGowan turn the beer over to the National Prohibition Department in February, 1927, does not prove that the petitioner did not know all the facts at the time the closing agreement was executed. Indeed, this is evidence to the contrary, for it was subsequent to this time, in October of 1927, after an investigation by the Commissioner, that the notice of deficiency was sent, and on November 15, 1927, that the deficiency was assessed and paid (R. 5, 6, 10, 24, 25). And it was not until January 27, 1928, that the closing agreement was finally executed (R. 6, 7, 10, 11, 24, 26).

6. With regard to taxpayer's promise to reward McGowan with sums of money to insure his continued silence, the only evidence showing payments to McGowan, which will be found by an examination of petitioner's record references, covered occurrences before February 28, 1927, at which time McGowan's

connection with the brewery ceased. For example, the purchase of an automobile to send McGowan away on a trip (R. 83), instructions to keep his mouth shut (R. 101), and an injunction to deceive McQuade as to the true ownership of the brewery (R. 106), all occurred prior to February 28, 1927.

With regard to taxpayer's alleged promise to pay McGowan between $60,000 and $75,000, this was first made in 1925 (R. 131). The reason for the payment was for the "rap" McGowan thought he would have to take (R. 131) and for the investigation he had to undergo (R. 132). These promises related to occurrences in 1925. The only other testimony concerning the same sum of money was that of McGowan who testified that taxpayer, on the Friday before April 19, 1928, had promised to pay him that amount, if he had to go to jail for a violation of the National Prohibition Act (R. 138). It was to protect McGowan's wife and children and not to insure silence that this promise was made (R. 138). This is borne out by the fact that, when the court decided McGowan did not have to go to jail, taxpayer did not make the payment to him.

7. The fact that taxpayer was not indicted with McGowan and McHugh in June, 1927, is certainly no evidence showing that petitioner did not know of taxpayer's connection with the brewery at the time the closing agreement was entered into in January, 1928. Since there was a deficiency assessment

in the fall immediately following, the contrary is the sole inference.

8. The fact that McGowan's break with taxpayer occurred after taxpayer refused to pay him and after the court handed down its decision of April 19, 1928, is certainly no evidence of petitioner's knowledge concerning taxpayer's interest in the brewery.

9. The fact that McGowan and his associates filed a claim in 1932 for having given the first information leading to the determination of the deficiency here involved, does not show that petitioner did not have knowledge of it until that time. For all this record discloses, this claim may have been or may be denied on the ground that it was not the first information.

Petitioner had made his own investigation in 1927 and in:

26 C. J. Sec. 75, 1163,

is stated:

> "Where the representee undertakes an independent investigation he is ordinarily chargeable with knowledge of all the facts which such an investigation should disclose. * * *."

However, what the petitioner's investigation disclosed does not appear in this record (Petitioner's Brief, page 7). In addition there is no evidence to show that taxpayer failed to disclose income received by him from the brewery at the time the closing agreement was executed. The only mention

of "first information" in the record comes from the printing on the Treasury form used in making claim for reward and this is no evidence whatsoever (Exhibit 1).

On the contrary, the deficiency notice, admittedly sent to taxpayer on February 24, 1932 (R. 8-9), shows that the alleged income from the brewery in the sum of $890,000 includes in it the additional income of $53,990.46 on which the assessment of 1927, covered by the closing agreement, was based. In the deficiency notice (R. 9), petitioner adopts from the taxpayer's original tax return as "net income reported" the figure of $19,198.33, adds to this as "other income not reported from operation of the P. F. McGowan Brewery of Edwardsville, Pa." the amount of $890,000, and as "corrected net income" takes the total of these two items, $909,198.33. This notice shows "tax previously assessed, original $194.56" which is the tax on $19,198.33, the net income originally reported. It also shows "tax previously assessed, additional $9,563.86," which is the deficiency paid in 1927 on an increase in income of $53,990.46, included in the closing agreement. Since this additional income of $53,990.46 is not specifically and separately referred to in the notice, it must be included in the $890,000 designated as income from the brewery. In the light of this and in the absence of any evidence to the contrary produced by the petitioner, it must be assumed that he knew, at the time he entered into the closing agreement with the taxpayer, that this additional tax-

able income of $53,990.46 had come from the operation of the brewery.

The fact that the present assessment is on an additional income of $890,000 and the assessment of 1927 was on an added income of only $53,990.46, does not prove that this is not the same income, because the $890,000, as found by the Board, is gross receipts from the brewery (R. 12-13, 28, 29-30) with no deductions for the costs of operation, whereas the $53,990.46 is net taxable income, and for all that appears in this record is the net taxable income of taxpayer from his interest in the brewery.

10. Petitioner argues that taxpayer's denial in the pleadings that he ever received any income from the operation of the brewery in 1925 indicates that income from the brewery was not included in the closing agreement.

However, this does not follow, for the taxpayer in the pleadings also expressly refused to concede the correctness of the income forming the basis of the closing agreement (R. 6). In other words, both as to the assessment covered by the closing agreement and the present assessment, taxpayer denied that there was any additional income which he received for 1925, but in each case the petitioner thought differently. Therefore, a denial of receipt of income from the operation of the brewery does not indicate that the closing agreement did not cover such income.

Furthermore, the pleadings in this case raised two distinct issues, first, was there fraud or misrepresenta-

tion in connection with the closing agreement, and second, was the original return false and fraudulent. The facts supporting both these issues were pleaded affirmatively by petitioner in his answer and in order to frame these issues, as required by the rules of the Board, taxpayer in his reply made appropriate denials. To meet the facts which petitioner averred supporting the issue of fraud relating to the closing agreement, the taxpayer denied that he had received any income in 1925 in addition to that covered by the closing agreement, or that any such income had been concealed from petitioner. In meeting the issue of a false return, taxpayer denied the receipt of any income from the brewery.

It is a well settled principle of evidence that a party is forbidden to resort to his adversary's pleadings on one issue in a cause to prove another issue in the same cause.

2 Wigmore on Evidence, Sec. 1064 (2).

As stated by Mansfield, *C. J.*, in:

Harington v. MacMorris, 5 Taunt. 228, 233 (1813):

"* * * it is every day's practice, that the defendant's language in one plea cannot be used to disprove another plea, as in the familiar instance I have given of trespass, and not guilty and a justification pleaded, where the justification would certainly, if admissible, prove the act, in case the reason of the justification fails. * * *"

Moreover, the denial in the pleadings upon which petitioner bases his argument is a pleading only. It was not offered in evidence and, therefore, has no evidential value. If petitioner had offered this denial in evidence, it would have been evidence against him on the issue whether the original return was false. Since petitioner did not take the risk of offering this adverse testimony on this issue, he should not now be allowed to use it on the other issue.

In addition, taxpayer's denial in the pleadings of any connection with the brewery is not necessarily inconsistent with the conclusion that the additional income taxed in 1927 was in fact net income from the brewery. The taxpayer might very well have consented to the taxability of the brewery income in connection with the execution of the closing agreement and still have been reluctant to admit his connection with the brewery in a formal document open to public inspection, such as the pleadings in this case. This is especially true in view of the fact that, although compelled to pay tax on his income regardless of source, he is not required to make admissions which might incriminate or degrade him.

United States v. Sullivan, 274 U. S. 259 (1927); Steinberg v. United States, 14 Fed. (2d) 564 (C. C. A. 2, 1926).

We fail to understand what force can be given to the insistence of taxpayer's counsel before the Board that petitioner sustain his burden of proving fraud both in the original return and in the closing agree-

ment (see petitioner's brief, page 22). Surely this is not evidence against their client.

At the hearing before the Board, petitioner, having the burden of proof, presented his evidence and rested (R. 308). The taxpayer thereupon moved, as he had moved previously, to limit the issues to the two questions on which petitioner had the burden of proof, namely, whether or not the original return was false and fraudulent with intent to evade tax and whether or not there was fraud, malfeasance or misrepresentation in connection with the closing agreement (R. 16-18, 43-44, 308-309).

In connection with this motion the taxpayer asked the Board to grant him the right to introduce testimony on the measure of his tax liability, if any, at a later date, provided the Board should hold the original return to be false and fraudulent with intent to evade tax or should set aside the closing agreement (R. 308-309).

The motion was denied and the request refused, whereupon taxpayer rested his case without offering evidence, on the ground that petitioner had failed to meet his burden (R. 309-310). The action of the Board in this regard was assigned as error in taxpayer's petition to the court below to review the Board's decision (R. 35-36).

II. Petitioner argues that the additional income on which the deficiency covered by the closing agreement was based, was about $53,000, whereas the income

derived from illegal operations of the brewery was $890,000. Here he intimates and later states (petitioner's brief, pages 27-28) that this $890,000 is net income. This is contrary to the petitioner's allegations and the Board's finding. Petitioner alleged in his deficiency notice and pleadings that $890,000 was gross receipts from brewery operations (R. 9, 12-13). The Board found *gross* receipts from the operation of the brewery in excess of $890,000 (R. 28-30). The cost of operations was not considered. The Board stated (R. 30):

> "* * * we do not understand that the respondent [now petitioner], even under petitioner's [taxpayer's] theory, should also be required to prove his deductions for him."

Nowhere is there any finding that $890,000 is *net* income or that the *net* income exceeded $53,000.

The analysis of the evidence which petitioner advances to support the Board shows that there is in reality no such clear and convincing proof as is required. His tenuous arguments lack conviction and leave unanswered the primary questions: *What income did the closing agreement cover?* and *Why did the petitioner not produce the best evidence in his power and the only real evidence which could prove his case?* This is the vital factor which cuts clearly across all else in petitioner's case. The conclusion is inescapable that such evidence was adverse to petitioner's own interest, or he would have used it.

As the court below so aptly stated (R. 318):

> "When the government is a litigant, it stands on the same basis as any other litigant and it is clear to us that if this was a case between private persons and one party was seeking to set aside a settlement made by the parties, he could not succeed where the failure to furnish was such as in the present case."

2. The Court below did not usurp the jurisdiction of the Board of Tax Appeals.

Petitioner charges that the court below ignored substantial evidence supporting the Board's finding of fact and usurped the jurisdiction of the Board by weighing the evidence and substituting its own finding for that of the Board.

This charge is unfounded. What the court below did was to determine from the record whether there was any substantial evidence to support the finding of the Board that brewery income was omitted from the closing agreement through fraud or malfeasance or misrepresentation.

Whether there was any substantial evidence to support the ultimate finding of the Board is clearly a question of law, or at least a determination of a mixed question of law and fact, which is the subject of judicial review, and on such review the court may substitute its judgment for that of the Board.

Colorado Bank v. Commissioner, 305 U. S. 23 (1938);

Bogardus v. Commissioner, 302 U. S. 34, 38 (1937);

Helvering v. Tex-Penn Co., 300 U. S. 481 (1937).

It is clear that the court below, in searching the record to determine whether there was substantial evidence to support the ultimate finding of the Board, was properly exercising its jurisdiction as defined by this Court and was not usurping the functions of the Board, as charged by petitioner.

The petitioner argues (brief, page 29) that the court below having concluded the evidence produced before the Board "permits two inferences to be drawn" (R. 316), it was the duty of the Board, not that of the court below, to draw one rather than the other inference and to declare the result.

It is plain that in its discussion on this point the court below did not intend to usurp the function of the Board. Rather it declared the familiar rule of law, applicable to both civil and criminal cases, that the burden of proof is not maintained by showing facts which are capable of two conflicting inferences. This is particularly so in the instant case. The burden being upon petitioner on the issue of fraud, his failure to produce the primary and best evidence of which the case would admit and within his power to produce, leaves the issue in doubt.

The failure of petitioner to show by the evidence in his possession[1] the nature of the additional income

[1] Such a failure, as here, was not present in Helvering v. Lazarus, No. 50, this Term, 84 Law. Ed. 171 (1939).

of $53,990.46, covered by the closing agreement, raises the presumption that if produced it would have been adverse to him. If an inference is to be drawn, it can only be that which is adverse to petitioner, namely, that the additional income included brewery income.

Contrary to petitioner's assertion (brief, page 27), the court below made no assumption that income from the brewery was included in the additional income of $53,990.46. Rather it concluded that petitioner's failure to produce the evidence in his possession of the nature of this income, necessitated a conclusion that he had not sustained his burden of proof. Such burden was not maintained, the court declared, by proof which left the issue in doubt.

CONCLUSION.

The situation which petitioner seeks to overcome may be stated as follows: Assume that taxpayer's original return was false and fraudulent, and that taxpayer withheld income which he should have returned. Petitioner made an independent investigation, found the additional income, taxed it, and then made a closing agreement, taxpayer having paid the additional tax.

Prima facie, this closing agreement is valid and was entered into with full knowledge of all relevant facts, especially those facts which an investigation such as was made should have or did disclose. Therefore, *prima facie,* the closing agreement included all taxable income not reported originally and included

the net income from the brewery which petitioner now seeks to redetermine and assess. If the facts are otherwise, the burden was on the petitioner to so prove.

The petitioner failed to meet this burden. Admittedly he produced no evidence to show his knowledge of the additional income determined in 1927 or the nature or source thereof. Although the facts disclosed by his independent investigation were known to petitioner and must have shown the nature and source of the additional income of $53,990.46, upon which the additional tax and interest of $10,437.18 was assessed and paid, and constituted the best available evidence on the issue, petitioner neither produced the report of the revenue agents who made the investigation, nor summoned them as witnesses.

Neither the petitioner, nor his agents testified, that at the time the final closing agreement was executed, they lacked knowledge that the taxpayer had received income from the brewery operations, or that the taxable income on which the closing agreement was based did not include net income therefrom.

In the absence of such direct and explicit evidence, which petitioner could have produced, the court below properly reversed the board and it is respectfully submitted that this decision should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 419.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* John Kehoe. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 26, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent Kehoe, in 1926, made an income tax return for 1925 and paid the amount computed thereon. In 1927, after inquiry concerning his affairs, the Commissioner assessed and collected an additional sum. Respondent waived appeal to the Board of Tax Appeals and became party to a closing agreement under section 1106(b) Revenue Act 1926,[1] approved by the Secretary of the Treasury January 27, 1928.

In 1932 the Commissioner undertook to set aside this agreement and made a deficiency assessment of more than Two Hundred Thousand Dollars, also a fifty per cent penalty. Respondent appealed to the Board of Tax Appeals where he maintained there was no adequate proof to support the assessment. The Board held the Commissioner had adequately sustained the burden of showing fraud or malfeasance or misrepresentation of fact, and did not err in setting the agreement aside.

The matter then went to the Circuit Court of Appeals, Third Circuit, which ruled there was no adequate evidence to support the con-

[1] January 26, 1926, c. 27, 44 Stat. 9, 113—

Sec. 1106(b). If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

clusion and judgment of the Board. The facts are much discussed in a majority and dissenting opinion 105 Fed. (2d) 552. Another narration of them seems unnecessary.

Under the rule often announced, the function of the Board of Tax Appeals is to weigh the evidence and declare the result as to matters properly before it. Upon review the court may not substitute its judgment of the facts for that of the Board. When there is substantial evidence to support the conclusion of the latter this must be accepted. *Helvering* v. *Rankin*, 295 U. S. 123, 131; *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206; *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37, 40.

Here, upon evidence which we think is substantial (the dissenting member of the court below held the same view), the Board found fraud in fact which affected the closing agreement, and that the Commissioner properly set the contract aside. The court below should have accepted this finding of fact. As it failed so to do the challenged judgment must be reversed. The ruling of the Board is affirmed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.